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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1896.**

No. 294.

H. M. LEVY, PLAINTIFF IN ERROR,

*vs.*

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT 9 THEREOF, HONORABLE J. V. COFFEY, JUDGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

**FILED JUNE 19, 1895.**

**(15,939.)**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1896.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. M. Levy, petitioner, and The Superior Court of the City and County of San Francisco, Department 9 Thereof, Hon. J. V. Coffey, judge, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said petitioner, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

2

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—

STEPHEN J. FIELD,
*Associate Justice of the Supreme Court of the United States.*

3 Personal service of the within writ of error on me is hereby admitted this twenty-eighth day of May, 1895.

W. H. BEATTY,
*Chief Justice of the Supreme Court of the State of California.*

Attest:

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By R. A. MARSHALL, *Deputy*.

4 In the Supreme Court of the State of California.

H. M. LEVY, Petitioner,
*v.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Department 9 Thereof, Hon. J. V. Coffee, Judge, Respondent.

The petition of H. M. Levy respectfully shows:

I.

That on or about the 28th day of May, 1891, at the city and county of San Francisco, State of California, one Morris Hoeflich died, he then and there being a resident of said city and county.

II.

That on or about the 15th day of July, 1891, a petition for letters of administration upon the estate of said deceased was filed in the superior court of the city and county of San Francisco, State of California, department 9 thereof; that thereafter and on or about the 19th day of April, 1893, by an order of said superior court, letters of administration upon the estate of said deceased were granted to one Solomon Hoeflich; that thereafter and on or about the 9th day of May, 1893, he qualified as such administrator, and letters of administration upon the estate of said deceased were issued to said Solomon Hoeflich, who ever since has been and now is the
5 duly appointed, qualified, and acting administrator of said estate of Morris Hoeflich, deceased; that thereafter and on the — day of June, 1893, in the matter of said estate, the said Solomon Hoeflich signed and filed a certain paper-writing or petition, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A;" that thereafter and on the 30th day of June, 1893, the said Solomon Hoeflich caused to be issued out of said court in the matter of the estate of Morris Hoeflich, deceased, and served upon this petitioner, H. M. Levy, a certain citation, a copy of which citation is hereto annexed and made a part hereof and marked Exhibit "B;" that thereafter this petitioner, H. M. Levy, appeared in court in answer to said citation and filed therein his demurrer in writing, a copy of which demurrer is hereto annexed and made a part hereof and marked Exhibit "C;" that thereafter the said de-

murrer was overruled by the said superior court, the Hon. J. V. Coffey presiding, and, by leave of the court first had and obtained, your petitioner served and filed his answer to said Solomon Hoeflich's petition in the matter of the estate of Morris Hoeflich, deceased, a copy of which answer is hereto annexed and made a part hereof and marked Exhibit "D."

III.

That in and by the said answer to the petition of said Solomon Hoeflich your petitioner, H. M. Levy, has specifically, under oath, denied that he concealed, conveyed away, or disposed of any moneys, goods, or chattels of the said decedent, Morris Hoeflich, and denied that he has or had in his possession or within his knowledge any deed, conveyance, bond, contract, or other writing which contains any evidence of or tends to disclose any right, title, interest, or claim of the said deceased in or to any real or personal estate or property
6 or in or to any claim or demand belonging to the said estate; and your petitioner has in and by said answer, under oath, specifically denied that the said Morris Hoeflich was ever a partner with your petitioner, H. M. Levy, or engaged with him jointly in any transaction in stocks or shares in mining or other corporations in the States of California and Nevada or elsewhere or in any mine or mines or in any other property, real or personal, and has specifically denied under oath in and by his answer each and every and all of the material allegations contained in the said petition of said Solomon Hoeflich; and your petitioner in that behalf alleges that an issue of fact has been raised in and by the said answer to the petition of Solomon Hoeflich in the said matter and upon all and every of the material allegations in said petition set out.

IV.

That the said petition was made and filed and the said proceedings taken by the said Solomon Hoeflich for the sole and express purpose of recovering a penalty of and from your petitioner, H. M. Levy, and that the purpose, object, and intent of said petition in the proceedings entitled "In the matter of the estate of Morris Hoeflich, deceased," is to deprive your petitioner of an equal portion of his property with that of any that may be found by the said superior court in the said matter to belong to the estate of Morris Hoeflich, deceased, in the possession of H. M. Levy.

That after the filing of said answer to the petitioner the Hon. J. V. Coffey, judge of said court, ordered and directed that your petitioner, H. M. Levy, appear before said superior court in the said matter on the — day of ——, 1893, to be then and there examined, under oath, together with such witnesses as might be then and there produced, touching all and singular the matters and things
7 in the said petition of Solomon Hoeflich set out, and especially touching the possession and knowledge of the said H. M. Levy of any deeds, conveyances, bonds, contracts, or other writings

which contain evidence of or tend to disclose the right, title, interest or claim of the estate of Morris Hoeflich, deceased, to any real or personal estate or to any claim or demand whatsoever.

And the said court further ordered and directed that the examination of the facts alleged in the petition of said Solomon Hoeflich and denied by the answer of H. M. Levy be proceeded with.

That your petitioned has objected to the court further proceeding in this matter, upon the ground that it had no jurisdiction of your petitioner, H. M. Levy, or of the subject-matter set forth in the said petition of Solomon Hoeflich or of these proceedings, and that it had no jurisdiction to try and determine in the matter of the estate of Morris Hoeflich, deceased, an issue of the fact wherein it was alleged by the said petition that property and effects of said estate were in H. M. Levy's possession, all of which was denied by the said H. M. Levy specifically under oath, and *when* it was denied that he had or ever had any property or effects in his possession belonging to or in which Morris Hoeflich in his lifetime was ever interested, and upon the ground that said court in the matter of the said estate and upon the said petition and the said answer had no jurisdictson to try the title to the property described and had no jurisdiction to try and determine an action to enforce a penalty against your petitioner; and, further, that it had no jurisdiction to try or determine any proceeding in the matter of the estate of Morris Hoeflich, deceased, the object of which was to deprive your petitioner, H. M. Levy, of a part *of* portion of his property, all of which objections were by the court overruled and denied.

Petitioner avers and states that said superior court and the
8 Hon. J. V. Coffey is proceeding further against your petitioner and is proceeding to hear and determine the facts and allegations set forth in the said petition of Solomon Hoeflich in the matter of the estate of Morris Hoeflich, deceased, and the answer of your petitioner, H. M. Levy, and is proceeding without and in excess of its jurisdiction, and that it will so proceed unless the said court is restrained by an order and writ of prohibition issued from this court. Petitioner further alleges that he is the party beneficially interested in the said matter and in these proceedings as petitioner herein, and that the estate of Morris Horflich, deceased, and the said Solomon Hoeflich are the real parties respondent whose interests would be directly effected by these proceedings; and your petitioner, H. M. Levy, further states and alleges that in the matter and things hereinbefore set forth and requested to be reviewed by means of a writ of prohibition that he has no direct appeal and no other plain, speedy, or adequate remedy besides a writ of prohibition.

Wherefore petitioner prays that on the foregoing facts that this court may grant a writ of prohibition, directed to said superior court of the city and county of San Francisco, State of California, department 9 thereof, and to the Hon. J. V. Coffey, judge thereof, and commanding it and said Hon. J. V. Coffey to refrain from trying or examining further into the said allegations and issues of fact

so raised as aforesaid in said matter, and such other and further relief as your petitioner may be entitled to.

H. M. LEVY, *Petitioner.*

REDDY, CAMPBELL & METSON,
BYRON WATERS,
*Attorney for Petitioner.*

9 STATE OF CALIFORNIA, }
*City and County of San Francisco,* } ss:

H. M. Levy, being duly sworn, deposes and says that he is petitioner in the above-entitled proceeding.

That he has heard read the above and foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information of belief, and as to those matters that he believes it to be true.

H. M. LEVY.

Subscribed and sworn to before me this 8th day of Dec., 1893.

HOLLAND SMITH, [SEAL.]
*Notary Public in and for the City and County of San Francisco.*

10 EXHIBIT "A."

In the Superior Court of the State of California in and for the City and County of San Francisco, Department No. 9.

In the Matter of the Estate of MORRIS HOEFLICH, Deceased.

The petition of Solomon Hoeflich to this honorable court, department 9 thereof, respectfully shows:

1. That on or about the twenty-eighth day of May, A. D. one thousand eight hundred and ninety-one at the city and county of San Francisco, State of California, the above-named decedent, Morris Hoeflich, who had long been and then was a resident of said city and county, died and, upon and according to the information and belief of your petitioner, then and there left estate, consisting of real and personal property.

2. That on or about the fifteenth day of July, A. D. one thousand eight hundred and ninety-one, in this honorable court, by its order then and there duly given and made, after due and regular proceedings on that behalf, A. C. Freese, then, ever since, and now public administrator in and for said city and county, was duly appointed the administrator of the estate of Morris Hoeflich, deceased, and letters of administration were then and there duly issued to him, and thenceforward he acted as such administrator until on or about the nineteenth day of April, A. D. one thousand eight hundred and ninety-three.

3. That on or about the 29th day of March, A. D. one thousand

eight hundred and ninety-three, your petitioner duly filed his
11 petition in this honarable court, in which, by reason of certain allegations of fact therein contained, *he* prayed this honorable court to revoke, vacate, and set aside the letters of administration so granted and issued as aforesaid to the said public administrator and to grant and issue letters of administration to your petitioner on the said estate of Morris Hoeflich, deceased; and thereafter, to wit, on or about the nineteenth day of April, A. D. one thousand eight hundred and ninety-three, after due and regular proceedings on that behalf, by the order of this honorable court then and there duly given and made, the said letters of administration to the said public administrator were duly revoked, vacated, and set aside, and letters of administration were duly granted to your petitioner, who thereafter, to wit, on or about the ninth day of May, A. D. one thousand eight hundred and ninety-three, duly qualified as such administrator, and letters of administration upon the estate of Morris Hoeflich, deceased, were then and there duly issued to your petitioner, and your petitioner ever since has been and he now is the duly appointed, qualified, and acting administrator of the said estate of Morris Hoeflich, deceased.

4. That your petitioner now refers to each and every the papers filed and proceedings in the matter of the said estate from and including the fifteenth day of July, A. D. one thousand and eight hundred and ninety-one, and prays that the same and the whole and every part thereof may be deemed and taken to be herein incorporated and to form a part of this petition.

5. That upon and according to the information and belief of your petitioner one H. M. Levy, long a resident of said city and county of San Francisco, has concealed, conveyed away, and disposed of moneys, goods, and chattels of the said decedent, Morris Hoeflich, and has in his possession and within his knowledge deeds,
12 conveyances, bonds, contracts, and other writings which contain evidence of and tend to disclose the right, title, interest, and claim of the said decedent to real and personal estate and to various claims and demands, and, in that belief, upon and according to his information and belief, your petitioner alleges the following facts and circumstances:

A. From information derived from and through a number of persons, most of whom are residents and engaged in business in the said city and county of San Francisco, but the names of whom your petitioner is unwilling now to disclose, your petitioner has ascertained that for many years prior to and down to the time of his death aforesaid the said Morris Hoeflich was either a full partner with the said H. M. Levy or engaged with him jointly in a large number of transactions in stocks and shares in mining corporations in the State of California and the State of Nevada and in other places, and also in mines in both of said States and in other places, and also in other property, real and personal, the exact nature and extent of which transactions and of the real and personal estate resulting therefrom can be ascertained by and examination of the said H. M. Levy and of other witnesses under oath and by the produc-

tion and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of the said H. M. Levy and by the production and examination of the books of account, correspondence, and other documents and writings in the possession of the various corporations, brokers, copartnerships, and other persons having their places of business in the said city and county of San Francisco, and among them Max Goldman, Goldman & Co., Hermann Zadig, Zadig, Wollberg & Co., Jeremiah Lynch, John Landers, Edward B. Holmes, the Hale and Norcross Silver Mining Company, and the Savage Mining Company.

13 B. The deceased, Morris Hoeflich, was sick for a period of eight months or thereabouts before his death aforesaid, but to a number of persons, whose names your petitioner is now unwilling to disclose, and upon many occasions and in many places in said city and county of San Francisco, the said Morris Hoeflich stated and represented that he was in partnership and had large joint interests with said H. M. Levy, with such details and particulars that while your petitioner is advised that the copartnership or the said joint interests could not be legally established by the declarations of the said Morris Hoeflich during his lifetime, nevertheless the fact that they were so frequently and circumstantially made confirms and strengthens the information otherwise received by your petitioner and the conviction produced thereby.

C. The said Morris Hoeflich, deceased, was largely interested with the said H. M. Levy in the profits of milling the ores of the Hale and Norcross mine in Storey county, Nevada. The interest held by H. M. Levy was one-eighth, of which the said Morris Hoeflich owned one-half or thereabouts. These profits were paid by checks drawn in favor of one Evan Williams, superintendent of the Nevada Mill and Mining Company, endorsed by him "H. M. Levy *et al.*," and delivered by him to said H. M. Levy. The person meant by the words "*et al.*" was the said Morris Hoeflich. These checks aggregated thirty thousand dollars or more. The books of account of the late Walter S. Hobart, deceased, will show these and other transactions in which the said Morris Hoeflich was interested with the said H. M. Levy either as partners or jointly.

D. The said H. M. Levy sold large quantities of mining stock and shares in the city of New York, *to* which the said Morris Hoeflich and himself were interested, within two years or

14 & 15 thereabouts prior to the death of said Morris Hoeflich, to one J. F. Tichenor and others, and realized and kept the proceeds thereof, the aggregate amount of which was large, but is unknown to your petitioner.

E. The said Morris Hoeflich and the said H. M. Levy were long directors together of the said Hale and Norcross Silver Mining Company, and were interested together in the stock or shares of that company, which was almost entirely under their control, although the said H. M. Levy took the more active part in the management thereof.

F. There were pass books or memorandum books kept by the said Morris Hoeflich during his lifetime and up to within a short period of his death, the entries in which showed the partnership or joint transactions between the said Morris Hoeflich and the said H. M. Levy, or many of them, but about the time of the death of said Morris Hoeflich the said pass book and memorandum books and each of them were missing, and, although efforts on that behalf have been made by your petitioner, they have not and none of them have been found.

G. For years prior to his death, May 28th, 1891, the said Morris Hoeflich had occupied and resided in two rooms at No. 310 Stockton street, in said city and county of San Francisco. For about three months prior to his death he was absent from his said rooms first, at the German hospital, and, second, at the house of Samuel, Rosener, No. 1225 O'Farrell street, San Francisco, in which he died, but he frequently visited said rooms, where he had a writing desk and other reseptacles, containing large packages of letters and other papers and documents, all kept systematically and in order and covering his business transactions or many of them, which remained there at the time of his death early the next morning, May
16 29th, 1891. By direction of H. M. Levy, who assumed to act for the estate of said Morris Hoeflich, all of the said packages, letters, and other papers and documents were removed from the said rooms and delivered to the said H. M. Levy. In July, 1891, after your petitioner arrived in San Francisco from Germany, he was informed by the said H. M. Levy, in the presence of one William Liebes, that he, the said H. M. Levy, had destroyed the said papers without reading them, for fear they might contain matter compromising to certain women.

6. That the foregoing are some only of the facts and circumstances brought to the knowledge of your petitioner, upon which this petition and application are based.

Wherefore your petitioner prays that, by the order of this honorable court, a citation may duly issue to the said H. M. Levy, directing and requiring him to appear before this honorable court, at the court-room of department 9 thereof, at a time to be designated in said order and in said citation, to be then and there examined under oath, together with such witnesses as may be then and there produced, toughing all and singular the matters and things in this petition aforesaid, and especially touching his possession and knowledge of any and all deeds, conveyances, bonds, contracts, or other writings which contain evidences of or tend to disclose the right, title, and interest or claim of the decedent, Morris Hoeflich, to any real and personal estate or any claim or demand whatsoever, and that the said H. M. Levy then and there produce each and every the said deeds, conveyances, bonds, contracts, and other writings, including all and singular the books of account, correspondence, checks, pass books, memorandum books, and other writings and documents in this petition aforesaid, to be then and there subjected to inspection and examination.

And for such order or orders and further additional and
17 different relief, any or all, as may be just and right in the premises.

Dated San Francisco, June 15th, A. D. 1893.

SOLOMON HOEFLICH, *Petitioner.*
HENRY E. HIGHTON,
*Attorney for Petitioner.*

18 EXHIBIT B.

STATE OF CALIFORNIA:

In the Superior Court of the City and County of San Francisco, Department No. 9. Probate.

In the Matter of the Estate of MORRIS HOEFLICH, Deceased.

The People of the State of California to H. M. Levy, Greeting:

You are hereby cited to be and appear in our superior court of the city and county of San Francisco, at the court-room of department No. 9, probate, thereof, at the new city hall, in said city and county of San Francisco, on Friday, the 30th day of June, A. D. 1893, at 2 o'clock p. m. of that day, then and there to be examined under oath, together with such witnesses as may be then and there produced, touching all and singular the matters and things set forth in the petition herewith served on you, and especially touching your possession and knowledge of any and all deeds, conveyances, bonds, contracts, or other writings which contain evidence of or tend to disclose the right, title, interest, or claim of the decedent, Morris Hoeflich, to any real or personal estate or to any claim or demand whatsoever, and that you, the said H. M. Levy, then and there produce and bring into court each and every the said deeds, conveyances, bonds, contracts, and other writing-, including all and singular the books of account, correspondence, checks, pass books, memorandum books, and other writings and documents mentioned in the said petition herewith served on you.

By order of our superior court, at the city and county of San Francisco, this 20th day of June, A. D. 1893.

Attest:
[SEAL.]

M. C. HALEY, *Clerk,*
By JOS. I. TWOLUG,
*Deputy Clerk.*

19 EXHIBIT C.

In the Superior Court of the City and County of San Francisco.

In the Matter of the Estate of MORRIS HOEFLICH, Deceased.

Comes now H. M. Levy, the person cited to appear before this honorable court, and objects to the sufficiency of the petition here, and by way of demurrer presents the following objections thereto:

I.

That said petition does not state facts sufficient to entitle petitioner to an order examining respondent, said Levy.

II.

That said petition shows upon its face that this court has no jurisdiction of this respondent, H. M. Levy.

III.

That said petition shows upon its face that this court, sitting as a probate court, has no jurisdiction of the subject-matter of these proceedings.

IV.

That said petition is ambiguous in this, that it cannot be ascertained therefrom whether respondent is charged with having possession of the property in said petition mentioned as a partner or as simply having a joint interest.

V.

That said petition seeks in these proceedings to obtain an accounting of alleged partnership affairs of the deceased and said Levy, and this probate court has no jurisdiction of such proceedings.

VI.

That petitioner is attempting by these proceedings to enforce a penalty against respondent Levy, and this court has no jurisdiction as a court of probate in such proceedings.

VII.

That said petition is not an oath of petitioner as required by section 1459 of the Code of Civil Procedure of the State of California.

VIII.

That subdivision "A" of said petition is uncertain in this, that it does not show from whom petitioner obtained the information therein alleged to have been obtained.

IX.

That subdivision "B" is ambiguous and uncertain in this, that it cannot be ascertained therefrom when, where, or to whom deceased made the declarations therein stated.

Wherefore respondent asks that the citation heretofore issued against him be dismissed and that he go hence.

BYRON WATERS,
I. B. L. BRANDT,
REDDY, CAMPBELL & METSON,
*Att'ys for Respondent.*

21 EXHIBIT D.

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of MORRIS HOEFLICH, Deceased.

Comes now H. M. Levy, and, for answer and return to the citation heretofore issued by the court, admits, denies, and alleges as follows:

I.

Respondent admits paragraph one, two and three and four of said petition.

II.

Respondent denies and says that it is not true that he ever did conceal or that he has concealed or conveyed away or disposed of any moneys or any goods or any chattels of any amount, kind, character, or nature whatsoever belonging to the decedent, Morris Hoeflich, or that he has or had at any time in his possession or under his control or has within his knowledge any deed or deeds, conveyance or conveyances, bond or bonds, contract or contracts, or any writing or writings of any kind or character which contain any evidence or tend to disclose any right, title, or interest or claim of the decedent, Morris Hoeflich, to any real or personal property or estate whatever or which contain any evidence of said decedent's right, title, or interest in or to any claim or claims, demand or demands against any person or persons, firms or corporations, or of any other kind; denies that he has or had at the time of the death of said decedent or at any time any paper or document of the character mentioned in paragraph "5" of said petition.

22 And for answer to subdivision "A" of said petition respondent denies upon his information and belief that said petitioner has ever been informed by or through any number of persons or by or through any person who is a resident of or engaged in business in the city and county of San Francisco or by any person whatever whose name plaintiff is unwilling to disclose, or that petitioner has ever been informed or ascertained, or that he has ever ascertained that for many years or for any time at all the deceased, Morris Hoeflich, and respondents were partners, or that said deceased *or* ever a full partner or a partner at all with respondent or for any period of time prior to the death of said Morris Hoeflich, or that said deceased was engaged jointly with respondent in a large number or in any number of transactions in stocks or shares in mining corporations in the State of California or in the State of Nevada or in any other place, or that they, the decedent and respondent, were ever partners in any property or transactions whatever, or that they were ever jointly interested in any property or transaction whatever, save and except that respondent has frequently loaned deceased money with which to purchase mining

stocks, but he, respondent, had no interest in such stocks nor in the proceeds thereof after the same were so purchased, and on several occasions, the last of which was in the year 1888, decedent, respondent, and other persons joined together in purchasing several blocks of stocks, but as soon as said stock so purchased was delivered it would be divided between said purchasers, each party taking his own share, and the deceased in every instance took his shares of the stock so purchased, and respondent had no interest in said stock thereafter, nor did deceased have any interest in respondent's shares so divided, and decedent, at the time of his death, did not have any
23 interest in any money, stock, or property owned or held by respondent, nor did respondent hold any property, money, stock, or anything belonging to deceased, except that deceased was indebted to respondent in a large sum of money for money loaned to him during his life.

Respondent alleges that no such transactions as are set forth in said subdivision "A" of said petition ever took place, nor were any such ever had, nor was there ever any real or personal estate resulting therefrom, nor can the nature of any such transactions be ascertained either by the examination under oath of said respondent or of other witnesses under oath, nor by the production or examination of any books of account, correspondence, checks, deeds, conveyances, bonds, contracts, or writings in the possession of respondent, for the reason that there are no such papers or documents, nor can any of such transactions be established by the production or examination of the books of account or correspondence or other documents in writing in the possession of various corporations, brokers, copartnerships, or other persons having their places of business in the city and county of San Francisco or at any other place or among them Max Goldman, Goldman & Co., Hermann Zadig, Zadig, Wolberg & Co., Jeremiah Lynch, John Landers, Edward E. Holmes, the Hale and Norcross Silver Mining Company, or by the examination of the books, papers, or documents of any other person, for the reason that there were never any such transactions; and respondent says that if petitioner was informed as to the matters and things as set forth in subdivision "A" of said petition such information was absolutely false and untrue, as is herein in this answer fully shown.

And for answer to subdivision "B" of said petition respondent alleges—

That as to the alleged sickness of Morris Hoeflich, as alleged therein, respondent admits the same, but as to the remaining
24 allegations therein in said subdivision contained defendant alleged that he has no information or belief of or concerning said allegations or upon the subject sufficient to enable him to answer them, and, placing his denial upon that ground, he denies the same and each and every part thereof.

And respondent further says that it is not true that said deceased, Morris Hoeflich, ever was in partnership with him, respondent, or that he ever had any joint interests or interest with him in any

transactions whatever other than as is herein in this answer mentioned.

And for answer to subdivision "C" of said petition respondent alleges—

That during the life of said Morris Hoeflich, up to the — day of September, A. D. 1890, said Morris Hoeflich and respondent were interested in the profits of the Nevada Mining and Milling Company—that is, that said deceased had a one twenty-fourth interest in said profits and respondent had a one twenty-fourth interest in said profits—but denies that he had a one-eighth interest in said profits, or that said deceased had one-half of said one-eighth of said profits, or that he had any greater interest than one-third of said one-eighth, and alleges that that was all of the interest that said deceased or said respondent had in the milling of the ores of the Hale and Norcross mine, as in said petition mentioned; admits that said profits were paid by checks drawn and which were endorsed and delivered to respondent, but denies that said checks were endorsed to respondent "*et al.*," as in the petition alleged, or that said "*et al.*" meant Morris Hoeflich; denies that said checks amounted to the sum of thirty thousand dollars, or that they amounted to any greater sum than about twenty-eight thousand dollars, and denies that said deceased had any greater interest in said sum or amount than one-third thereof, and alleges that respondent paid the said Morris Hoeflich his said share of said amounts from time to time as said money was received, and that he paid said deceased the last portion of his said share on or about the — day of September, 1890, and alleges that said Morris Hoeflich had received the full amount due him from said profits long prior to his death, and at the time of his death respondent was not indebted to him in any sum whatever growing out of said transaction and did not hold any money that belonged to him growing out of the same.

And respondent upon and according to his information and belief denies that the books of the late Walter S. Hobart, deceased, will show the transaction as set forth in said petition or any other transactions in which Morris Hoeflich was apparently interested with respondent either as a partner or jointly.

And for answer to subdivision "D" of said petition respondent denies that he ever at any time sold any mining stocks or shares in the city of New York in which the said Morris Hoeflich and himself were interested, or that within two years or within any time prior to the death of the said Morris Hoeflich he, respondent, sold any stocks or shares to J. F. Tichenor or to any person, or that he realized or kept any proceeds from any such sales, or that there was ever any such sales made as in said subdivision "D" set forth, or that there was ever any amount realized from any such a sale or sales.

And for answer to subdivision "E" of said petition respondent denies that he and said deceased were at any time interested to-

gether in the stocks or shares of the Hale and Norcross Silver Mining Company.

And for answer to subdivision "F" of said petition re-
26 spondent alleges that if there ever were any such pass books or memorandum books as in said subdivision set forth respondent has no knowledge of them and never had any of them in his possession or under his control, but denies that the entry in said or in any pass book or pass books or memorandum books would show any partnership or joint transaction between said deceased and respondent.

And respondent says that if said pass books are or were missing he has no knowledge of them nor of their whereabouts and never has had.

And for answer to subdivision "G" of said petition respondent denies upon his information and belief that deceased, Morris Hoeflich, ever had or kept in his rooms at 310 Stockton street packages of letters or papers systematically or otherwise in order or that he kept them at all, or that there were any papers, letters, or documents in said room showing the business transactions of said Hoeflich at the time of his death or at any time; and respondent denies that — any time on the 29th day of May, 1891, or at any other time or ever or at all that any package or packages, paper or papers, document or documents, or anything of any kind or character were delivered to respondent either by his direction or at his request, or that any paper of any kind or character was delivered to him, except a life-insurance policy upon the life of said deceased, which was delivered by respondent to the public administrator immediately.

Respondent denies that he ever at any time assumed to act for the estate of said Morris Hoeflich, deceased, excepting that respondent advanced and paid certain sums of money to defray the payment of the funeral expenses and the expenses attending the last illness of the said Morris Hoeflich, deceased, part of which said sums were subsequently repaid to him.

27 Respondent denies that in July, 1891, or at any other time he ever informed the petitioner, in the presence of one William Liebes or in the presence of any other person or that he ever informed petitioner at all, that he had destroyed any papers of said Morris Hoeflich for any reason whatever, for the reason that affiant never received any such papers as set forth in said subdivision "G," and did not destroy any such, and never so informed petitioner or any other person or persons.

And respondent further alleges that he has not now and did not have any money, property, goods or chattels, stocks, bonds, contracts or agreements or any contracts or agreement, or any deed or document in writing of any kind, character, or nature belonging to said Morris Hoeflich in his possession or under his control, nor had he nor has he any knowledge of the existence of any such papers, nor was he indebted to said Morris Hoeflich in any sum or amount whatever.

Wherefore respondent asks that said petition be dismissed and said citation discharged.

BYRON WATERS,
REDDY, CAMPBELL & METSON,
I. B. L. BRANDT,
*Attorneys for Respondent.*

Endorsed: Petition. Filed Dec. 11, 1893. L. H. Brown, clerk, by P. V. Long, deputy.

28 *Order of Court, Dec.* 11, 1893.

By the court:

LEVY
*vs.*
SUPERIOR COURT, CITY AND COUNTY OF S. F. } No. 15577.

Ordered that an alternative writ of prohibition issue herein, returnable before the supreme court in bank on Friday, Dec. 22nd, 1893, at 10 a. m., and that proceedings in the superior court be stayed pending determination herein.

29 Service of the within writ is hereby admitted this 12th day of December, 1893.

HENRY C. HIGHTON,
*Attorney for Solomon Hoeflich, Administrator of the Estate of Morris Hoeflich.*

Service of the within writ is hereby admitted this 15th day of December, 1893.

J. V. COFFEY,
*Judge Superior Court, Dept. —, Probate.*

30 In the Supreme Court of the State of California.

H. M. LEVY, Petitioner,
*v.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Department 9 Thereof, *and* Hon. J. V. Coffey, Respondent.

The People of the State of California to the superior court of the city and county of San Francisco, State of California, Hon. James V. Coffey, judge, Greeting:

Whereas it has been made manifest to our supreme court by the petition and affidavit of H. M. Levy, which petition and affidavit *has* been duly presented to this court and filed herein, that there is a certain special proceeding pending before you, entitled "In the matter of the estate of Morris Hoeflich, deceased," in which matter a petition of Solomon Hoeflich, administrator of said estate, has been filed, and upon which a citation has been issued requiring H. M.

Levy to appear before the said court in the said matter and make answer upon oath as to certain property, contracts, papers, and writings alleged in said petition to be in the possession of the said Levy and to be the property of the said estate, and alleging other facts, which are more fully set out in the petition and the answer thereto filed by the said H. M. Levy; and it being made manifest to our supreme court that you, the said superior court of the city and county of San Francisco, State of California, threaten to proceed and will proceed with the hearing of certain of the issues raised
31 in the said petition of Solomon Hoeflich and the answer thereto of H. M. Levy, and it satisfactorily appearing to this court that it is a proper case for a writ of prohibition, and that there is not a plain, speedy, or adequate remedy in the course of law, we therefore command you to desist and refrain from trying the said matter and to desist and refrain from further proceedings therein until the further order of this court, and that you show cause before this court, at the court-room thereof, in the city and county of San Francisco, State of California, on the 22nd day of December, 1893, at 10 o'clock a. m. of said day, why you should not be restrained from trying the issues of fact and proceeding further in the matter of said petition of Solomon Hoeflich and the answer of H. M. Levy thereto or take any further proceedings therein other than such as may be directed by this court.

Witness the Hon. W. H. Beatty, chief justice of our supreme court, at the court-room, in the city and county of San Francisco, 11th day of December, 1893.

[SEAL.]

L. H. BROWN, *Clerk*,
By G. E. MADISON,
*Deputy Clerk.*

Endorsed: Alternative prohibition. Filed Dec. 16th, 1893. L. H. Brown, clerk, by Geo. A. McCalny, deputy. 1.20 p. m.

32 I received the annexed writ on the 15th day of December, A. D. 1893, and afterwards, to wit, on the 15th day of December, A. D. 1893, I served a copy of the same (together with a copy of the petition for the annexed writ) personally on Hon. J. V. Coffey, judge of the superior court, department 9, of the city and county of San Francisco, State of California.

Dated Dec. 15th, 1893.

JOHN J. McDADE, *Sheriff.*
W. E. WHITE,
*Deputy Sheriff.*

33 In the Supreme Court of the State of California.

H. M. LEVY, Petitioner,
*vs.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Department 9 Thereof, Hon. J. V. Coffey, Judge, Respondent.

Now comes the Superior Court of the City and County of San Francisco, Department 9 thereof, and J. V. Coffey, the respondents above named, and answer the petition of H. M. Levy, the petitioner above named, filed in the above-entitled proceeding, and for answer thereto:

1. Deny that the said petition of Solomon Hoeflich mentioned in said petition filed herein by said Levy was made or filed, or that the said proceedings likewise mentioned as taken by the said Hoeflich were, or that any of them was, taken by the said Hoeflich for the sole or express purpose, or at all, of recovering a penalty of or from the said Levy, or that the purpose or object or intent of said petition of said Hoeflich is to deprive the said Levy of any portion of the property of said Levy.

2. Deny that the said superior court mentioned in said petition filed herein by said Levy or the said J. V. Coffey, judge thereof, in proceeding further against the said Levy or in proceeding to hear and determine the facts and allegations or any facts or alle-
34 gations set forth in said petition of Solomon Hoeflich or the answer of said Levy is proceeding without or in excess of its or his jurisdiction or will so proceed unless restrained by an order or writ of prohibition issued by this honorable court.

Wherefore respondents pray that the said petition of the said H. M. Levy for a writ of prohibition be denied, and that respondents have judgment for their costs.

Dated San Francisco, December 22, 1893.

H. E. HIGHTON,
*Attorney for Respondents.*

35 In the Supreme Court of the State of California.

H. M. LEVY, Petitioner,
*vs.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Department 9 Thereof, Hon. J. V. Coffey, Judge, Respondent.

Now comes the Superior Court of the City and County of San Francisco, Department 9 thereof, and J. V. Coffey, the respondents above named, and demur to the petition of H. M. Levy, the petitioner above named, filed in the above-entitled proceeding, and for cause of demurrer thereto *thereto* say—

That said petition does not state facts sufficient to entitle the said petitioner to a writ of prohibition, as prayed for in said petition, or to any writ of prohibition whatever.

Wherefore respondents pray that the said petition may be denied. Dated San Francisco, December 22, 1893.

HENRY E. HIGHTON,
*Attorney for Respondents.*

36 [Endorsed:] No. 55577. Dep't—, supreme court, State of California. H. M. Levy, petitioner, *vs.* The Superior Court of City and County of San Francisco, &c., respondent. Demurrer to *prohibition* for writ of prohibition. (Copy.) Filed Dec. 22nd, 1893. L. H. Brown, cl'k, by Geo. A. McCalvy, deputy clerk. Henry E. Highton, Mills building, S. F., attorney for respondents.

37 In the Supreme Court of the State of California.

H. M. LEVY, Petitioner,
*v.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Department Nine Thereof, Hon. J. V. Coffey, Judge, Respondent. } 15577.

Jan'y 6, 1895.—Writ denied.

VAN FLEET, *J.*

We concur.
FITZGERALD, *J.*
HARRISON, *J.*
GAROUTTE, *J.*
BEATTY, *C. J.*

Dissenting opinion, McFarland, J.

I concur.
DE HAVEN, *J.*

38 [Endorsed:] No. —. In the supreme court, State of California. H. M. Levy, petitioner, *vs.* The Superior Court of the City and County of San Francisco, etc. Judgment.

39 Filed Jan. 6, 1895.

Prohibition, Superior Court of San Francisco Co.—J. V. Coffey, J.

For pet'n'r, Byron Waters, J. B. Brandt; Reddy, Campbell & Metson.
For resp't, Henry E. Highton.

In bank.

H. M. LEVY, Petitioner,
*vs.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF San Francisco, Department Nine Thereof, Hon. J. V. Coffey, Judge, Respondent. } No. 15577.

Morris Hoeflich died at the city and county of San Francisco in May, 1891, and Solomon Hoeflich was by the superior court of said city and county appointed administrator of his estate.

Thereafter on the — day of June, 1893, the administrator filed in said superior court a petition in the matter of said estate averring in substance, that it had come to his knowledge that said deceased was at and prior to his death either a full partner with one H. M. Levy, or engaged with said Levy jointly in a large number of transactions in stocks and mines in California and Nevada and in other property, "the exact nature and extent of which transactions and of the real and personal estate resulting therefrom can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts and other writings and documents now in the exclusive possession of said H. M. Levy;" and also by the examination of other named persons and documents, etc., in their possession. The petition further averred that said Levy has concealed, conveyed away and disposed of moneys and property of said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest and claim of said deceased to real and personal property"—portions of such property being particularly described. The prayer was that said Levy be cited to appear before said court and undergo an examination under oath, together with such witnesses as might be then produced, touching all the matters set forth in the petition, "and especially touching his possession and knowledge of any and all deeds, conveyances, bonds, contracts or other writings, which contain evidences of or tend to disclose the right, title and interest or claim of the decedent, Morris Hoeflich, to any real or personal estate, or any claim or demand whatsoever;" and that said Levy be required to produce all said deeds, conveyances and other writings, books of account, etc., for inspection and examination.

In response to a citation issued upon said petition, said Levy appeared and demurred, which demurrer being overruled he filed a verified answer specifically denying all the material averments of the petition; denied that he had any property in which the deceased was interested as a partner or otherwise, or that he had any documents or writings relating to any such property. He also filed written objections to any further proceedings in the matter of said examination; but the demurrer and the objections were overruled and a day was set by the court for the examination.

Thereupon said Levy filed his petition here setting up these facts, upon which he makes this application for a writ of prohibition directed to said court and the Hon. J. V. Coffey, judge thereof, commanding said respondents to refrain and desist from further proceeding with said contemplated examination.

An alternative writ was issued, in response to which respondents have demurred and answered, and the matter has since been argued and submitted.

The proceedings in the superior court which are called into question by this application for prohibition were admittedly taken under

and in pursuance of sections 1459 and 1460 of the Code of Civil Procedure, and these sections are as follows:

"SECTION 1459. If an executor, administrator or other person interested in the estate of a decedent complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings, which contain evidences of or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted; but if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate."

"SECTION 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be *prima facie* evidence of the rights of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

Petitioner contends that these provisions of the code are unconstitutional and void, and that the proceeding in the superior court is, therefore, without warrant of law. His position is that they are obnoxious to several features of the constitution of the State, and more particularly to section 3 of article I, which provides that: "No

person shall * * * be compelled in any criminal case to be a witness against himself;" and to section 19 of the same article which provides that: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated."

These two provisions of the constitution are of well-understood significance; they involve like principles, and in considering the objection made may be regarded as one.

The argument of petitioner is that these sections of the code are distinctly penal in character and contemplate a proceeding which is in its essential nature criminal, within the meaning of the above provisions of the constitution; that being a criminal proceeding petitioner is protected by the constitution from being compelled to testify against himself or submit his books and papers in evidence.

There is no question that if petitioner's premises are correct his conclusion follows necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this court directly at variance with that put upon them by petitioner. Sections 1458 to 1461 of the Code of Civil Procedure were, prior to the adoption of the codes, a part of the old probate act, as sections 116 to 119; they are a part of the same article and relate to the same subject which is expressed in the title as "embezzlement and surrender of property of the estate." In the case of Jahns *vs.* Nolting, 29 Cal., 507, this court had occasion to construe section 116 of the probate act (now section 1458, C. C. P.) upon the very feature now involved. That was an action by an administrator to recover property belonging to the estate of his decedent, which he alleged had been embezzled by defendant and converted to his own use. The lower court held that the action was brought under section 116 of the probate act, which alone gave plaintiff a remedy for the wrong; that the statute was penal in its nature and that the plaintiff was bound to prove the embezzlement as alleged or fail in his action. Judgment having gone against him the plaintiff appealed, and in disposing of that question the court said:

"The position that section one hundred and sixteen affords the exclusive remedy for embezzling and alienating the effects of the deceased, intermediate the death of the deceased, and the grant of administration, cannot be maintained, unless that section can be held to be a penal statute. * * * The distinctions between penal and remedial statutes are not always clearly marked, nor are the authorities quite harmonious where statutes very similar in their purpose and general terms have been under review. A penal statute is one that imposes a penalty, or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong that concerns the good of the public, and is commanded or prohibited by law. The law generally first prescribes what shall or shall not be done, and then declares the penalty. Its primary object is punishment, and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action. Reed *vs.* Northfield, 13 Pick.,

94; The Suffolk Bank *vs.* The Worcester Bank, 5 Pick., 106; Frohck *vs.* Pattee, 38 Maine, 103; Bayard *vs.* Smith, 17 Wend., 88; Sedg. Stat. and Const. Law, 390." And it was held that the section was not penal, but purely remedial.

Sections 1459 and 1460 are strictly within the principles of construction announced in that case. They are no more penal in their essential features than is section 1458. It was true that, as urged by petitioner, they provide for pains and penalties in the way of imprisonment and damages under certain contingencies; but the essential distinction between these provisions and a penal statute is that the penalty is not imposed as a punishment for a public wrong, but as redress for a private grievance. And it is not unusual to find provisions of a similar character in statutes purely remedial. Both before and since Jahns *vs.* Nolting these sections have several times been under consideration by the court. In Beckman *vs.* McKay, 14 Cal., 250, the court considered the action, which was brought under section 116 of the probate act, as in the nature of an action of trover and conversion; and in Mesmer *vs.* Jenkins, 61 Cal., 151, it is said: "That under a statute very similar, if not precisely like sections 1458 to 1461, C. C. P., the power of a judge of probate, in respect of matters of this kind, is analogous in its extent and object to the power exercised by courts of chancery upon bills of discovery."

Petitioner relies largely in support of his position upon Boyd *vs.* United States, 116 U. S., 616; and Counselman *vs.* Hitchcock, 142 U. S., 547. But we think those cases entirely distinguishable in principle from and not at all in conflict with the views expressed in Jahns *vs.* Nolting. There are, it is true, some general expressions and language in those cases which, read without reference to the particular facts of those cases, might be construed as supporting the petitioner's position. But when considered in the light of what was before the court and the premises from which they were reasoning, any seeming conflict fades away. In the case of Boyd *vs.* United States a statute declared that any person who, with intent to defraud the revenue of the United States, should commit or omit certain acts, should for such offense be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years or both; and in addition should forfeit the merchandise in respect to which the wrongful acts were performed. Under this statute an information was filed against certain goods charging an offense under the act, and asking the forfeiture of the goods. In the course of the proceeding, Boyd having appeared as a claimant of the property and denied any act of forfeiture, and it being important to the Government to show the quantity and value of the goods, a motion was made by the U. S. district attorney for an order directing the claimant- to bring into court a certain invoice alleged by him to be in their possession and to contain proof of the truth of the allegations of fraud made by the United States. Such order was made, and, in obedience to it, the claimants produced the invoice, which was used as evidence against them on the trial.

Speaking of the character of the proceeding, it was said by the court, page 634:

"In this very case the ground of forfeiture, as declared in the twelfth section of the act of 1874 on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute, and it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or be imprisoned not exceeding two years or both; and, in addition to such fine, such mer-
41 chandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants upon conviction the forfeiture of the goods could have been included in the judgment. If the Government prosecutor elects to waive an indictment and to file a civil information against the claimants—that is, civil in form—can he by this decree take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. * * * As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. * * *"

The difference between the proceeding under discussion there and the proceeding complained of here by the petitioner was recognized in the same opinion in the following language, page 624:

"The entry upon premises, made by a sheriff or other officer of the law for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration or an execution, is not within the prohibition of the fourth or fifth amendment or any other clause of the Constitution; nor is the examination of a defendant under oath, after an ineffectual execution for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But when examined with care it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods the owner from whom they were stolen is entitled to their possession, and, in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and, until such duties are paid, has a right to keep them under observation or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice,

and is no more than what the court of chancery would direct on a bill for discovery."

In the Counselman case, which was a case growing out of the refusal of Counselman to testify before a grand jury upon an investigation of alleged violations of "An act to regulate commerce," on the ground that his answers might tend to criminate him, the court held it was within the principles announced in the Boyd case and reaffirmed those principles. The case of Lees *vs.* United States, 14 S. C. Reporter, 163, is another case falling strictly within the principles of Boyd *vs.* U. S.

These considerations dispose of the main objection of petitioner. The other objections to the constitutionality of the statute are in our judgment without merit.

Nor is the objection tenable that the proceeding in the probate court involves passing upon title to property and is on that ground without its jurisdiction. *Ex parte* Casey, 71 Cal., 269; Matter of Curry, 25 Hun., 320.

Writ denied.

VAN FLEET, *J.*

We concur:

FITZGERALD, *J.*
HARRISON, *J.*
GAROUTTE, *J.*
BEATTY, *C. J.*

*Dissenting Opinion.*

I dissent. This is an original petition here by H. M. Levy for a writ of prohibition to be directed to the Superior Court of the City and County of San Francisco, Department No. 9, and Hon. J. V. Coffey, judge thereof, commanding said court and said Coffey to refrain from further prosecuting a certain proceeding instituted in said court against said petitioner. An alternative writ was issued; and on the return day the respondent demurred and answered, and the matter was then submitted.

It appears that the administration of the estate of one Morris Hoeflich, deceased, is pending in the court of respondent, sitting as a probate court; and that one Solomon Hoeflich is administrator of said estate. On the — day of June, 1893, the said Solomon Hoeflich, as such administrator, filed in said court, in the matter of said estate, a certain writing, or petition, the contents of which are substantially these: It is therein averred that, from information derived from persons whose names said administrator is unwilling to disclose, he has ascertained that the said deceased, Morris Hoeflich, prior to and down to the time of his death "was either a full partner with the said H. M. Levy, or engaged with him jointly in a large number of transactions" in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions and of the real and personal estate resulting therefrom can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and

examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy;" and also by examination of other named persons and documents, etc., in their possession. It is also averred that said Hoeflich, deceased, before his death represented to a number of persons, whose names the administrator is unwilling to disclose, "that he was in partnership and had large joint interests with said H. M. Levy;" and that the fact that he made such representation "confirms and strengthens the information otherwise received by your petitioner and the conviction produced thereby." It is also averred in general terms that said Levy has concealed, conveyed away and disposed of moneys, etc., of the said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest and claim of the said decedent to real and personal property," portions of said property being particularly described. The foregoing are, in brief, the material averments of said petition; and it was prayed therein that said Levy be cited to appear before said probate court and undergo an examination under oath as to all the matters set forth in said petition, and subject all his documents, writings and papers to inspection and examination. A citation was issued according to the prayer of the petition to said Levy, who appeared and demurred to the petition; and the demurrer having been overruled he filed a lengthy written verified answer in which he specifically denied all the material averments of said petition, and denied that he had any property in which the said decedent was interested, either as a partner or otherwise, or that he had any documents or writings of the character alleged in said petition. He also filed written objections to any further proceeding in the matter of said petition and citation; but the court overruled the objections and set a day for the examination. Whereupon the said Levy filed here the present petition for a writ of prohibition, setting up all the foregoing facts, and praying that the respondents be restrained from proceeding with said examination; and he contends that said proposed examination is beyond the jurisdiction of said court, and that certain provisions of the Code of Civil Procedure, upon which he contends the proceeding is based, are unconstitutional and void.

The proceeding sought to be prohibited, if valid at all, must rest for its validity upon sections 1459 and 1460 of the Code of Civil Procedure. Our general law of procedure is averse to proceedings which are in their character inquisitorial. The only provision in the Code of Civil Procedure in the nature of a bill of discovery, other than said sections 1459 and 1460, is contained in section 1000, which provides that "any court in which *an action is pending*, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense thereto;"

and the proceeding here in question is certainly not under
42 that section. Of course, the probate court would have no jurisdiction over any action to determine conflicting rights of property between the estate of Hoeflich and the petitioner herein, H. M. Levy. Moreover, no such action is pending.

Sections 1459 and 1460, above referred to, are as follows: "Section 1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to the superior court or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings, which contain evidences of or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate. Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts or other writings containing evidences of or tending to disclose the right, title, interest or claim of the decedent to any real or personal estate, claim or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order of such disclosure made upon such examination shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

It is contended by petitioner herein that these provisions are in contravention of section 13 of article I of the State constitution,

which provides that: "No person shall * * * be compelled in any criminal case to be a witness against himself;" and of section 19 of the same article, which provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." He also contends that they contravene section 11 of said article, which provides that: "All laws of a general nature shall have a uniform operation," and section 25 of article IV, which provides that no special law shall be passed "regulating the practice of courts of justice," for the reason that they give special privileges to administrators over other litigants. It is also contended that the probate court could not make the orders sought here to be restrained without passing upon rights of property between the estate of Hoeflich and said Levy—which it has no jurisdiction to do.

I shall not discuss any of the above positions taken by petitioner except the first two. The two provisions that a person shall not be compelled to be a witness against himself in a criminal case, and shall be secure against unreasonable seizures and searches, are so akin to each other that they are both covered by those judicial decisions and constitutional inhibitions which have established the personal rights and liberties of Englishmen and Americans. A compulsory production of a man's private papers is, in effect, compelling him to be a witness against himself. It will be sufficient, however, in this case, to particularly consider only the first of these two provisions, although the second is necessarily involved. And, basing our decision on that provision, I am of the opinion that upon the principles announced and the decisions made by the Supreme Court of the United States in the cases of Boyd *vs.* United States, 116 U. S., 616; Counselman *vs.* Hitchcock, 142 U. S., 547, and Lees *vs* United States, 14 S. C. Reporter, p. 163, the contention of petitioner must be sustained, and that the writ of prohibition should issue as prayed for.

If the proceeding in the probate court sought here to be restrained were, *in form*, a "criminal case," there could be no plausible contention that in view of section 13 of article I of the State constitution, the petitioner could be compelled to be a witness against himself. But in the Boyd case it was held that the fourth and fifth amendments to the Federal constitution—which are similar to said sections 13 and 19 of our State constitution—applied to a proceeding to recover a penalty of forfeiture, although the proceeding was not criminal in form. That was a suit to forfeit Boyd's property for an alleged violation of a revenue law, and the court held that to compel him to produce books and papers as evidence against him was a violation of said amendments. The court say that suits for penalties and forfeitures "are within the reason of criminal proceedings for all the purposes of the fourth amendment to the Constitution and of that provision of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." The court further say that "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of pro-

cedure," and that "this can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual deprivation of the right, as if it consisted more in sound than substance." Afterwards the same court in Counselman *vs.* Hitchcock, 142 U. S., 547, expressly approved the decision in the Boyd case, and declared that in the Boyd case it was held that a statute which authorized a court to require a party to produce his private papers in court was "unconstitutional and void, as applied to a suit for *a penalty* or to establish a forfeiture of the goods of the party, because it was repugnant to the fourth and fifth amendments of the Constitution;" and, furthermore, that "it is an ancient principle of the law of evidence that a witness shall not be compelled, *in any proceeding*, to make disclosures or to give testimony which will tend to criminate him or to subject him to fines, penalties or forfeitures." But the principle was still more directly decided in the late case of Lees *vs.* United States, 14 S. C. Reporter, p. 163. That was a civil action brought by the United States to recover a penalty of $1,000 for the violation of an act of Congress prohibiting the importation of aliens under contracts for labor. The circuit court compelled Lees, one of the defendants, to become a witness for the Government against his objection that the suit was in the nature of a criminal proceeding and that he could not be compelled to testify; and on a writ of error to the United States Supreme Court the judgment was reversed. The Supreme Court, by Mr. Justice Brewer, said: "This, though an action in civil form, is unquestionably criminal in its nature; and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd *vs.* United States, 116 U. S., 616. The question was fully and elaborately considered in that case; and within the rule there laid down it was error to compel this defendant to give testimony in behalf of the Government."

It is quite clear that said sections 1459 and 1460 include a "penalty" within the meaning of the authorities above noticed. Indeed, the whole scope of the proceedings which it is their purpose
43 to authorize is, in its nature, *quasi* criminal. It is founded upon the fact that the party to be examined "is suspected" of being guilty either of the embezzlement or smuggling, or of the fraudulent concealment and secret and unlawful disposition of property of another. Certain things are to be done if he "is found innocent." But, if the contrary is found, then an order for disclosure is to be made, which he must obey or be sent to jail. And then it is provided that such order for disclosure shall be *prima facie* evidence of the right of the administrator to the property involved in any action brought for the recovery of such property; and that "any judgment recovered therein *must be for double the value* of the property as assessed by the court or jury, or for return of the property and damages in addition thereto equal to the value of such property." It is thus sought to compel the party examined to testify and to produce his private papers for the purpose of furnishing

evidence upon which may be based an order that will make a *prima facie* case against him in an action for a penalty which may be of the most grave character. If he be defeated in such action, although he may have defended it with the utmost good faith, and under an honest claim of right, the judgment against him will not be, as in ordinary civil actions, for the value of the property or its return with the usual incidental damages, but, in addition to that, the judgment "must be" for a second full value of the property as a penalty, and cases might easily arise where the amount of such penalty would greatly exceed the highest fine provided as punishment for a crime by any section of the penal code. I am satisfied, therefore, that the said sections of the code are within the inhibition of the constitutional provision of said section 13 of the constitution of the State. And under the rule and the authorities above cited a person in the position of the petitioner cannot be compelled to give testimony or produce papers which would tend to make a case against him, or furnish *data* or links of evidence favorable to such case. I have just noticed the recent case of United States *vs.* James, reported in vol. 49, No. 24, of the Albany Law Journal, p. 401, in which Judge Grosscup of the United States district court, N. D., Ill., in a very interesting opinion discusses the subject here under review at great length. In that case the learned judge holds that a person cannot be compelled to testify or produce documents that may tend to criminate him, although there be a statute providing that he shall not be prosecuted or punished for the matter about which his testimony is sought. He holds that the purpose of the fourth and fifth amendments was not confined to the protection of a witness against "law-inflicted pains and penalties only," but that the purpose was "to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure;" and that "the privilege of silence, against a criminal accusation, guaranteed by the fifth amendment, was meant to extend to all the consequences of disclosure." This doctrine is, perhaps, extreme. It may be that a statute exempting a witness from prosecution and from any exposure to penalities or forfeitures for the acts or things about which he is called upon to testify, might remove him from behind the constitutional shield. I have noticed the James case, however, because it is the latest judicial expression upon the general subject, and because the opinion discusses very fully the personal rights of individuals under English and American institutions. Of course, if our views hereinbefore expressed, and the authorities therein cited, are correct, the petitioner herein can invoke these constitutional principles equally with one who is a party to an action which is strictly in form criminal.

If the administrator of the estate of Hoeflich, deceased, believes, from information which he has, that said estate has a just cause of action against the petitioner herein, he has the privilege of bringing an action against said petitioner in the proper court; and when said action is pending he may avail himself, like other litigants, of the provisions of section 1000 of the Code of Civil Procedure to have an inspection of such books, documents and papers in the posses-

sion of said petitioner as the court may deem proper, and may also examine said petitioner as a witness in the case.

I think that a peremptory writ of prohibition should issue as prayed for in the petition. McFARLAND, *J.*

I concur:
DE HAVEN, *J.*

44 In the Supreme Court of the United States.

H. M. LEVY, Petitioner,
*vs.*
THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO and J. V. COFFEY, Judge, Respondents.

Know all men by these presents that we, H. M. Levy, as principal, and H. A. Hedger and R. F. Morrow, as sureties, are held and firmly bound unto the respondents, The Superior Court of the City and County of San Francisco and J. V. Coffey, judge, in the full and just sum of five hundred dollars, to be paid to the said Superior Court of the City and County of San Francisco and J. V. Coffey, judge, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at the supreme court of the State of California, in a suit pending in said court between H. M. Levy, petitioner, and The Superior Court of the City and County of San Francisco and J. V. Coffey, judge, respondents, a judgment was rendered against the said H. M. Levy, and the said H. M. Levy having obtained a writ of error and filed a copy thereof in the clerk's office of
45 the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Superior Court of the City and County of San Francisco and J. V. Coffey, judge, citing and admonishing them and each of them to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof, pursuant to said writ of error:

Now, the condition of the obligation is such that if the said H. M. Levy shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

H. M. LEVY. [SEAL.]
H. A. HEDGER. [SEAL.]
R. F. MORROW. [SEAL.]

Signed, sealed, and delivered in presence of—
W. H. METSON.

Approved by—
STEPHEN J. FIELD,
*Associate Justice of the Supreme Court of the United States.*

May 21st, 1895.

46 UNITED STATES OF AMERICA,
*Northern District of California, City and County of San Francisco,* } *ss:*

H. A. Hedger, of No. 1608 Golden Gate Ave., in said city and county of San Francisco and said northern district of California, and R. F. Morrow, of No. 916 Leavenworth street, in said city and county of San Francisco and said northern district of California, the sureties on the foregoing bond, make oath and say each for himself that he is a freeholder in said city and county of San Francisco, and that he is worth the sum of five hundred dollars over and above his just debts and liabilities in property subject to execution and sale, and that the property of the said H. A. Hedger consists of real estate at the northwest corner of Scott St. and Golden Gate avenue, in said city and county of San Francisco, being one hundred and fifty feet on Golden Gate avenue and one hundred and twenty-five feet on Scott St., unincumbered—assessed valuation, $20,000; real valuation, $40,000—and that the property of said R. F. Morrow consists of real estate on California St. between Sansome and Montgomery Sts., in said city and county of San Francisco, said real estate being 25 by 100 feet, improved and of the value of $100,000.

H. A. HEDGER.
R. F. MORROW.

Sworn to before me this 13th day of May, 1895.

W. B. BEAIZLEY,
[SEAL.] *Deputy Clerk and Commissioner U. S. Circuit Court, Northern District of California.*

47 Endorsed.

I hereby certify that in my opinion the sureties who have signed the within undertaking are well worth the amount of said undertaking and the penalty therein, to wit, five hundred dollars.
May 13th, 1895.

W. J. COSTIGAN,
[SEAL.] *Clerk U. S. Circuit Court, Northern District of California.*

48 UNITED STATES OF AMERICA, *ss:*

To the Superior Court of the City and County of San Francisco, Department 9 Thereof, Hon. J. V. Coffey, judge, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein H. M. Levy is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this 21st day of May, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN J. FIELD,
*Associate Justice of the Supreme Court of the United States.*

49 Personal service of the within citation on writ of error on me is hereby admitted this twenty-eighth day of May, 1895.

J. V. COFFEY,
*Judge of the Superior Court of the City and County of San Francisco, State of California, Department No. 9 Thereof.*

Attest:

[Seal Superior Court, City & County of San Francisco, Cal.]

C. F. CURRY, *Clerk*,
By J. B. MARTIN, *Deputy*.

Attest:

50 In the Supreme Court of the State of California.

I, T. H. Ward, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a full, true, and correct copy of the record in cause No. 15577, H. M. Levy *vs.* The Superior Court of the City and County of San Francisco, Dep't 9 Thereof, Hon. J. V. Coffey, judge, as shown by the records of my office.

Witness my hand and the seal of the court this 13th day of June, A. D. 1895.

[Seal Supreme Court of California.]

T. H. WARD, *Clerk*,
By A. W. JOHNSON, *Deputy*.

[Endorsed:] Supreme Court of the United States. H. M. Levy, plaintiff in error, *vs.* Superior Court of the City and County of San Francisco, def't in error. Writ of error and return.

Endorsed on cover: Case No. 15,939. California supreme court. Term No., 294. H. M. Levy, plaintiff in error, *vs.* The Superior Court of the City and County of San Francisco, Department 9 Thereof, Hon. J. V. Coffey, judge. Filed June 19th, 1895.

Office Supreme Court U. S.
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CLERK.

# Supreme Court of the United States.

**OCTOBER TERM, 1896.**

*No. 294.*

H. M. LEVY, PLAINTIFF IN ERROR,

*vs.*

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT 9 THEREOF—HONORABLE J. V. COFFEY, JUDGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

## BRIEF OF WILLIAM A. MAURY, FOR THE PLAINTIFF IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1896.**

*No. 294.*

H. M. LEVY, PLAINTIFF IN ERROR,

*vs.*

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT 9 THEREOF—HONORABLE J. V. COFFEY, JUDGE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

## BRIEF OF WILLIAM A. MAURY, FOR THE PLAINTIFF IN ERROR.

This is a proceeding in prohibition.

On December 8, 1893, the plaintiff in error applied to the Supreme Court of California for a writ of prohibition for the purpose of restraining and prohibiting the Superior Court of the City and County of San Francisco, Department

9 thereof, Honorable I. V. Coffey, Judge, from further entertaining a proceeding instituted June 15, 1893, in said Court against the plaintiff in error, H. M. Levy, by one Morris Hoeflich, claiming to be the administrator of a certain Solomon Hoeflich, deceased, on the ground that the said Superior Court had no jurisdiction to entertain the said proceeding against the plaintiff in error, Levy. (Rec., pp. 2–5.)

PROCEEDINGS OF THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, BEING EXHIBITS A, B, C, D OF THE PETITION IN PROHIBITION.

The proceedings in the Superior Court of the City and County of San Francisco which the plaintiff in error, Levy, sought to arrest by the writ of prohibition were instituted by Solomon Hoeflich, administrator, under sections 1459 and 1460 of the Code of Civil Procedure of California, which sections are, as follows:

> SEC. 1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to the Superior Court, or a judge thereof, on oath, that any person is suspected to have *concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent,* or has in his possession or knowledge *any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will,* the said court or judge may cite such person to appear before such court, and *may examine him on oath upon the matter of such complaint.* If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears *and is found innocent,* his necessary expenses must be allowed him out of the estate.

SEC. 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. *If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent*, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

The petition, by which Hoeflich sought to put these provisions in motion against Levy, states that, according to petitioner's information and belief, the plaintiff in error had "concealed, conveyed away, and disposed of moneys, goods, and chattels of the said decedent, Morris Hoeflich, and has in his possession, and within his knowledge, deeds, conveyances, bonds, contracts, and other writings which contain evidence of and tend to disclose the right, title, interest, and claim of the said decedent to real and personal estate and to various claims and demands."

The petition then sets forth that "from information derived from and through a number of persons, most of whom

are residents and engaged in business in the said City and County of San Francisco, *but the names of whom your petitioner is unwilling now to disclose,*" the decedent Morris Hoeflich was a full partner of or otherwise jointly interested with plaintiff in error in a large number of transactions in mining stocks and shares and in mines and in other property real and personal "the exact nature and extent of which transactions and of the real and personal estate resulting therefrom can be ascertained by *an examination of the said H. M. Levy* and of other witnesses *under oath,* and by the *production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of the said H. M. Levy* and by the production and examination of the books of account, correspondence, and other documents and writings" in the possession of certain named corporations, firms, and individuals.

The petition then advances several specifications of suspicion, in the effort to make a pretext or probable cause for subjecting the plaintiff in error to the statutory inquisition.

In obedience to the prayer of the petition, a citation was issued to the plaintiff in error to appear before the Court "*to be examined under oath*" * * * touching all and singular the matters and things set forth in the petition, and especially touching his possession and knowledge of any and all deeds, conveyances, bonds, contracts or other writings relating to the estate of the said Morris Hoeflich, and "then and there produce and bring into Court each and every of the said deeds, conveyances, bonds, contracts, and other writings, including all and singular the books of account, correspondence, checks, pass books, memo-

randum books and other writings and documents mentioned in the said petition herewith served on you." (Rec., p. 9.)

In obedience to this citation, Levy appeared in Court and demurred to the petition (Rec, pp. 9, 10). His demurrer having been overruled, Levy then filed an answer, in writing (Rec., pp. 11–15), denying, with all possible circumstantiality, the several specifications of the charges and accusations of the petition that Levy had "concealed, conveyed away, and disposed of moneys, goods, and chattels of the said decedent, Morris Hoeflich" and had in his possession and within his knowledge "deeds, conveyances, bonds, contracts and other writings which contain evidence of and tend to disclose the right, title, interest, and claim of the said decedent to real and personal estate and to various claims and demands."

But notwithstanding this answer, the Superior Court ordered the examination called for by the petition to proceed; to arrest which action the writ of prohibition was applied for.

ALTERNATIVE WRIT OF PROHIBITION.

On December 11, 1893, an alternative writ of prohibition, directed to the Superior Court of the City and County of San Francisco, Department 9, thereof, Hon. I. V. Coffey, Judge, was issued. (Rec., pp. 15, 16.)

ANSWER OF SUPERIOR COURT AND HON. J. V. COFFEY, JUDGE.

On December 22, 1893, the said Court and the judge thereof answered (Rec., p. 17) and demurred (Rec., pp. 17, 18) to the petition of the plaintiff in error, Levy, affirming the

jurisdiction of the Court and questioning the sufficiency of the petition, in point of law.

JUDGMENT.

On January 6, 1895, the Supreme Court of California denied the writ of prohibition, two judges dissenting (Rec., p. 18). The majority and minority opinions are given in the record (pp. 18–30).

WRIT OF ERROR FROM THIS COURT.

On May 21, 1895, a writ of error from this Court to the Supreme Court of California was allowed by Mr. Justice Field on application of the petitioner, Levy. (Rec., p. 1.)

ASSIGNMENT OF ERRORS.

It is respectfully submitted that the judgment of the Supreme Court of California should be reversed for error, in this, that the denial of the application for the writ of prohibition involved an affirmance of the validity of sections 1459 and 1460 of the Code of Civil Procedure of California and an affirmance of the jurisdiction of the Superior Court of the City and County of San Francisco to extort from the plaintiff in error and others, constituting the small class that falls within the purview of the said inquisitorial provisions, self-accusatory answers, and compel them to submit to unreasonable searches and seizures of their papers and effects in violation of the provisions of the Constitution of the State of California that "no person shall * * * be compelled in any criminal case to be a witness against himself" (sec. 3, art. 1), and that "the right of the people to

be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated" (sec. 3, art. 19), and that, as a consequence, the deprivation of the plaintiff in error and his class of the protection of the said provisions of the State Constitution by the said erroneous judgment constituted a denial by the State of California to the plaintiff in error and his class of "*the equal protection of the laws*," guaranteed to them by the Constitution of the United States. (Art. 14, sec. 1, amendments.)

ARGUMENT.

Whether the subjection of the plaintiff in error to the ordeal prescribed by sections 1459 and 1460 of the Code of Civil Procedure by the denial of the writ of prohibition withdraws him from the protection of the guaranties of the State Constitution against compulsory self-crimination and unreasonable seizures and searches and so deprives him of "the equal protection of the laws," is a question which this Court will determine upon its own interpretation of the provisions of the State Code of Civil Procedure and of the State Constitution, without regard to any interpretation put upon those provisions by the State Supreme Court. (Yick Wo *vs.* Hopkins, 118 U. S., 356; Barbier *vs.* Connolly, 113 U. S., 27; Pembina Mining Co. *vs.* Pennsylvania, 125 U. S., 181; Soon Hing *vs.* Crowley, 113 U. S., 703; Bryan *vs.* Board of Education, 151 U. S., 639; Mobile & Ohio Railroad Co. *vs.* Tennessee, 153 U. S., 486, and cases there cited; Crowley *vs.* Christensen, 137 U. S., 86.)

The provision of the Constitution of California, that "no person shall be compelled in any criminal case to be a wit-

ness against himself" is the same, word for word, as the provision contained in the Constitution of the United States, and as the latter provision received great consideration from this Court in the case of Counselman *vs.* Hitchcock (142 U. S., 547), what is there laid down is equally applicable to the provision in the State Constitution, and must control the inquiry whether sections 1459 and 1460 of the Code of Civil Procedure can be enforced without removing the party proceeded against from the protection of the guaranty of the State Constitution against compulsory self-incrimination.

In Counselman *vs.* Hitchcock (*supra*) the Court rejected the argument that the constitutional immunity was applicable only to the defendant in a criminal prosecution, and gave the words of the immunity the most liberal meaning, so as to reach proceedings of every description—civil as well as criminal, and so as to protect a party or witness from being compelled to answer any question "which might tend to show that he himself had committed a crime." In the language of the Court, "The privilege is limited to criminal matters, *but it is as broad as the mischief against which it seeks to guard.*"

Coming now to the provisions of the Code of Civil Procedure, we think it a matter of grave concern that the plaintiff in error has not been able to find a refuge in the State of California from the persecution in the name of those provisions of law which has driven him to this Court. It does not argue well for the security of our liberties that in the State of California, in the broad daylight of American liberty, any person who is "*suspected*" of having unlawfully appropriated property belonging to the estate of a decedent, may be cited, on application of a personal representative, or

other person interested in such estate, before a court or judge and *compelled* to answer, under oath, whether he has "CONCEALED, EMBEZZLED, SMUGGLED, CONVEYED AWAY OR DISPOSED OF any money, goods or chattels of the decedent," and whether he "has in his possession any deeds, conveyances, bonds, contracts or other writings which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate or any claim or demand, or any lost will." (Sec. 1459 Code Civ. Proc.)

As if to dispel doubt as to the *criminal character* of the proceeding for which the section provides, the concluding sentence declares that the party proceeded against shall, under certain circumstances, be allowed his necessary expenses if "he appears and is FOUND INNOCENT." It is the *suspected criminal* that is stretched upon the rack, and he is pronounced *innocent or guilty*, as the result of the ordeal may require.

There is something alarming in the reflection that if a *suspected criminal* proceeded against under this act should claim his constitutional privilege not to answer to a matter that might criminate him, it would be a *contempt* for which, under section 1460, he could be committed to "the county jail, there to remain in close custody *until he submits to the order of the court*, or is discharged according to law." There is no alternative for the party refusing to answer, *no matter on what ground*, but to go to jail. It is quite incredible that so tyrannical a piece of legislation should be upheld by any court or be submitted to by any community. Well and wisely did George Mason say in the Bill of Rights of Virginia that a "frequent recurrence to fundamental principles" is a necessary means to the

preservation of free government and the blessing of liberty, language which is made still more impressive when read in the presence of legislation which does not encourage the belief that its authors had a habit of recurring frequently to fundamental principles.

Section 1460 also provides that "If upon such examination it appears that he has *concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods, or chattels of the decedent* or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts *or other writings containing evidences of or tending to disclose* the right, title, interest or claim of the decedent to any real or personal estate, claim or demand or any lost will of the decedent" the Court may order the suspected criminal to disclose his knowledge to the personal representative and enforce the order by committing the suspected criminal to jail, "there to remain until the order is complied with, or he is discharged according to law."

And, as if the sanctions of this legislation were not severe enough, section 1460 goes on to provide, that the order of the Court requiring the suspected criminal to disclose to the personal representative the information which the Court is of opinion he possesses "shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for DOUBLE THE VALUE OF THE PROPERTY as assessed by the Court or jury, or for return of the property *and damages in addition thereto, equal to the value of such property.*"

The enormity of this legislation is more glaring when the character of the discovery authorized by it is contrasted

with the discovery granted by a Court of Chancery, the difference being, that Chancery will not compel a respondent to answer as to a matter which might criminate him and will not invade his right to be protected as to his papers from unreasonable searches.

Contrast also the obnoxious provisions of the Code of Civil Procedure with section 15 of the Judiciary act of 1789 clothing the United States courts, when sitting as courts of common law, with power to enforce the production of documents. That a convenient comparison may be made between this piece of legislation, the work of men who did frequently recur to fundamental principles, and the provisions of the California Code of Civil Procedure, prepared by men who, apparently, had never found it necessary to examine the foundations on which our liberties rest, we give the section from the Judiciary act:

> § 15. All the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, *in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery;* and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on motion as aforesaid, to give judgment against him or her by default.

Mr. Justice Bradley quotes the section in full in his great judgment in the case of Boyd *vs.* United States (116 U. S., 616, 631), and appeals to it as embodying the views of the first Congress on the question of compelling a man to pro-

duce evidence against himself, and then proceeds to make the following interesting observations on the section:

> The restriction of this proceeding to "cases and under circumstances where they (the parties) might be compelled to produce the same (books or writings) by the ordinary rules of proceeding in chancery," shows the wisdom of the Congress of 1789. The court of chancery had for generations been weighing and balancing the rules to be observed in granting discovery on bills filed for that purpose, in the endeavor to fix upon such as would best secure the ends of justice. To go beyond the point to which that court had gone may well have been thought hazardous. Now it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

That learned judge would have found it difficult to use moderation in characterizing the Californian method of enforcing discovery over those barriers and limitations to which he refers and which no chancellor has ever been bold enough to disregard. Indeed, it is but to look into any book on Chancery Practice to see with how careful a hand the Court orders the production of documents; going, we may say, to the extreme verge of cautiousness in making *conclusive* the defendant's statement in his answer that a document called for by the bill and admitted to be in his possession has no relevancy to the complainant's case, so that no evidence will be heard to countervail the denial, though justice should fail, as a consequence. The vigilance of the English Chancellors in guarding the subject's right to have the privacy of his

papers respected and to have protection from incriminating interrogation is pregnant with instruction.

It may be well to notice briefly the way in which Solomon Hoeflich, Administrator, presented himself to the Superior Court of the City and County of San Francisco in making application for a citation against the plaintiff in error, Levy.

He knew nothing himself against Levy, but had heard from others, "*the names of whom your petitioner is unwilling now to disclose,*" that Levy had "*concealed, conveyed away and disposed of* moneys, goods, and chattels of the decedent, Morris Hoeflich, and has in his possession and within his knowledge deeds conveyances bonds, contracts and other writings which contain evidence of and tend to disclose the right, title, interest and claim of the said decedent to real and personal estate and to various claims and demands."

But the petitioner alleges that the only certain information in the premises can be had "by an examination of the said H. M. Levy and of other witnesses under oath, and by the production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of the said H. M. Levy," &c.

Wherefore he prays the statutory citation, that Levy may be "examined under oath" in the premises and required to produce "each and every the said deeds, conveyances, bonds, contracts, and other writings, including all and singular the books of account, correspondence, checks, pass books, memorandum books, *and other writings and documents* in this petition aforesaid, to be then and there SUBJECTED TO INSPECTION AND EXAMINATION." (Rec., p. 8.)

Levy, as already stated, appeared to the citation, and filed

a full answer denying all the allegations of the petition in detail, but the judge ordered him to submit to the statutory ordeal notwithstanding.

It will be perceived that the case thus presented in the petition is a more flagrant violation of the citizen's right to be secure, as to his private papers, from unreasonable searches and seizures than was presented in the case of Boyd *vs.* United States (*supra*), for there the defendant had precise notice of the paper to be produced, and the grievance was that by compelling its production Boyd was made to be his own accuser, but *here* the rigor and severity of the statute are invoked to force Levy to produce his papers, generally, to be pried into and "SUBJECTED TO INSPECTION AND EXAMINATION," thus plainly violating the said constitutional guaranty, aside from the consideration that the papers sought to be inspected and examined may contain evidence to criminate Levy, which is a further aggravation, as well as an instance where the 4th and 5th Amendments run into one another, as Mr. Justice Bradley remarked in Boyd's case.

It is true that tyrannical searches and seizures of papers are, generally, for the purpose of finding some evidence of guilt, but another evil of such excesses consists in invading and destroying the citizen's privacy and exposing to public inspection the secrets of his desks and drawers which are as sacred to him, and shall be as inviolable, as the secrets of his heart. What would life be worth without the principle of Anglo-American liberty, "*That the house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose?*" *Domus sua cuique est tutissimum refugium.*

Now, it may be asked, what would be the difference between sending officers, armed with a general warrant or a writ of assistance, into Levy's house to break open his desks and drawers and pry into his papers of every description, and the method provided by the Californian law of abusing the sanctity of his person by casting him into jail until he produces those same papers in Court for inspection?

Mr. Justice Bradley answers the question effectually in his opinion in Boyd *vs.* United States (*supra*). He says:—

> Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet as before said, *it contains their substance and essence and effects their substantial purpose.* It may be it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. *A close and literal construction deprives them of half their efficacy*, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of Courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

This language of the learned judge would, no doubt, have been stronger still if the penalty for refusing to produce the invoice called for had been imprisonment, *as it is in this case.*

The position taken by the Court below that sections 1459 and 1460 are purely civil and remedial, and, therefore, that the constitutional guaranties against self-crimination and against "unreasonable searches and seizures" have no application to proceedings under said sections, cannot stand with what this Court has laid down.

Conceding for the sake of argument that the proceeding in question is civil in character, the argument is not advanced thereby, for the real question is, what is the scope and character of the interrogation which that proceeding calls for. If the "*suspected*" party can be asked whether he has "*concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods, or chattels of the decedent*," or if, upon answering that he has in his possession papers and documents throwing light on the decedent's affairs, he may be sent to jail until he produce them, regardless of whether they would criminate him or not, it would seem to make a mockery of the constitutional guaranties in question to say that they have no application to such proceedings.

This is wholly inconsistent with the doctrine of Counselman *vs.* Hitchcock, where the Court said:

> It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. *The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.* The privilege is limited to criminal matters, *but it is as broad as the mischief against which it seeks to guard* (p. 562).

This language leaves no doubt on the point that the interrogation or examination authorized by the State Code is inadmissible because of its manifest tendency to criminate the party subjected to it. There was a question in Boyd *vs.* United States and in Lees *vs.* United States (150 U. S., 476) as to whether the proceedings involved related to a subject that had any criminal complexion, but in this case the mind cannot hesitate about the matter. In the cases men-

tioned argument was made by the Court to show that they were in fact criminal in character, but in this case the mind intuitively perceives that the compulsory examination of a "*suspected*" party as to whether he has "*concealed, embezzled, smuggled, conveyed away or disposed of*" property of a decedent, and the requirement that he shall produce all his papers relating to such property, under pain of imprisonment, constitute an inquisition of a directly criminal character.

There would seem to be no room for doubt that the words in Counselman *vs.* Hitchcock "that a person should not be compelled, when acting as a witness IN ANY INVESTIGATION, to give testimony which might tend to show that he himself had committed a crime" cover the case at bar completely, and render it entirely irrelevant to discuss whether the proceedings authorized by the State Code are criminal or civil, and narrow the case down to the proposition, whether a party can be *compelled* "*in any investigation,*" civil or criminal, to answer when questioned as to whether he has "*concealed, embezzled, smuggled, conveyed away or disposed of*" property belonging to a decedent's estate. The proposition refutes itself.

Before leaving this branch of the argument we would respectfully call the attention of the Court to the able opinion of the dissenting judges, which will be found to be characterized by a sensitive appreciation of the constitutional immunities, now in question, akin to that which marks the opinions of this Court in the cases above relied on.

THE FEDERAL QUESTION.

If the aforegoing argument is well founded, it requires little, if any, discussion to show that sections 1459 and 1460 of the Code of Civil Procedure of California are in plain violation of the provision of the 14th Amendment of the Federal Constitution, which declares that no State shall "*deny to any person within its jurisdiction the equal protection of the laws.*"

Manifestly, the withdrawal from the protection of the guaranties of the State Constitution against compulsory self-crimination and against unreasonable searches and seizures of papers and property of persons who may happen, from time to time, to be "*suspected*" of having "*embezzled*" or otherwise made away with property belonging to a decedent's estate, which we have shown to be the effect of the provisions of the State Code, constitutes a denial to such persons by the State of "*the equal protection of the laws*" under circumstances both alarming and aggravating. Further argument cannot make more glaring the enormity of this legislation, and is rendered unnecessary by the judgment of this Court in the case of The Gulf, &c., Rlwy. Co. *vs.* Ellis, decided at the present term.

It is respectfully submitted, therefore, that the judgment of the Supreme Court of California denying the writ of prohibition is erroneous and should be reversed.

WM. A. MAURY,
*For the Plaintiff in Error.*